

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

**THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR
&
THE HONOURABLE MR. JUSTICE K.M.JOSEPH**

WEDNESDAY, THE 25TH OCTOBER 2006 / 3RD KARTHIKA 1928

ST.Appl..No. 8 of 2006

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AGAINST THE ORDER DATED 28/02/2006 IN
NO. R4/64939/2003/CT of COMM. OF COMMERCIAL TAXES,
TRIVANDRUM**

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APPELLANT.

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ZEENA JOMON, JOSE BROTHERS GOLD SUPER
MARKET, VADANAPPALLY.**

**BY ADV. DR.K.B.MUHAMED KUTTY (SR.)
SRI.K.M.FIROZ**

RESPONDENT:

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THE COMMISSIONER OF COMMERCIAL TAXES,
THIRUVANANTHAPURAM.**

BY GOVT. PLEADER (SHRI GEORGEKUTTY MATHEW)

**THIS SALES TAX APPEAL HAVING BEEN FINALLY HEARD
ON 25/10/2006, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:**

**C. N. RAMACHANDRAN NAIR &
K. M. JOSEPH, JJ.**

S.T.A. NO. 8 OF 2006

Dated this the 25th day of October, 2006

JUDGMENT

C. N. Ramachandran Nair, J.

Question arising in the Appeal filed under Section 40 of the KGST Act against the order of the Commissioner of Commercial Taxes issued under Section 37 of the KGST Act, is whether appellant is liable to pay interest levied in the assessment under Section 23(3) of the KGST Act for the differential tax assessed over the compounded tax paid under Section 7(1)(a) of the KGST Act. Appellant who is a dealer in jewellery, applied for payment of tax at compounded rate under Section 7(1)(a) of the KGST Act for the year 2001 - 2002. Tax payable under Section 7(1)(a) of the Act during that year was 120 per cent of the compounded rate of tax paid by appellant for the preceding year or 120 per cent of the tax payable based on the return or accounts in that year, whichever is higher. Appellant made application in Form No.21 under Rule 30 of the

KGST Rules offering to pay an amount of Rs.3,51,907/= being tax, according to her, payable under Section 7(1)(a) of the Act. Even though the Officer passed orders allowing facility in terms of the claim made by appellant, it was noticed in the course of assessment that there was short payment because of non-inclusion of tax on purchase turnover of old gold which was disclosed in the Accounts for 2000 - 2001. It is conceded that the appellant while filing return for the year 2000 - 2001 did not include purchase turnover of old gold under Section 5A of the KGST Act, even though the Accounts disclosed purchase turnover of old gold. Since the tax payable at compounded rate under Section 7(1)(a) of the Act during the year 2001 - 2002 was 120 per cent of the tax paid for the preceding year or the tax payable based on return or Accounts for the preceding year whichever is higher, the Officer while making assessment noticed that the tax payable by appellant at compounded rate, had tax on purchase turnover been included as required under the relevant provision, would have been Rs.3,77,350/= as

against Rs.3,51,907/= paid by the appellant. Since short paid tax was part of compounded tax which was admitted liability of the appellant, the Assessing Officer demanded interest for the belated payment of differential tax of Rs.1,47,803/=. Even though the Assessing Officer has levied interest of Rs.42,863/= for the belated payment of tax, he has not stated the provision under which the interest is levied. The appellant admitted her liability to pay additional amount of tax under Section 7(1)(a) as demanded by the Officer, but contested the levy of interest before the Deputy Commissioner, who in revision, cancelled the demand of interest following the decision of the Supreme Court in Maruthi Wire v. Sales Tax Officer ((2001) 2 KLT 100) on the assumption that interest levied was under Section 23(3) of the KGST Act. The Commissioner of Commercial Taxes noticed that the revisional authority went wrong in cancelling levy of interest, without reference to the relevant statutory provision, namely Section 23(3A) and, therefore, he initiated proceedings in exercise of the powers conferred on him under Section 37(1)

of the Act and revised the order restoring interest. It is against this order that the appellant has filed this Appeal.

2. We have heard learned senior counsel Dr. K.B. Mohamedkutty, appearing for appellant and the learned Government Pleader appearing for the respondent. Since the Assessing Officer did not refer to the provision under which interest was levied, it was the duty of the first revisional authority to identify the relevant provision under which interest was levied. Instead, without referring to the relevant provision, Section 23(3A), the Deputy Commissioner wrongly cancelled interest by assuming that it was levied under Section 23(3) of the Act. Therefore, in principle, we uphold the order of the Commissioner of Commercial Taxes in interfering with the first revisional order. Even though we feel, prior to the levy of interest the Officer should have issued notice proposing interest with reference to the statutory provision under which it was proposed and heard appellant/s objections, we do not think such an opportunity should be granted to appellant now, because the

Commissioner has considered the case on merits and sustained the levy, after hearing the contentions of appellant. Therefore, the question to be considered is whether interest was rightly levied under Section 23(3A) of the KGST Act on the differential tax demanded and paid by appellant under the system of compounding. We note that the differential tax demanded, though initially contested, was later remitted by appellant without further contest. However, learned senior counsel for appellant contended that the system of compounding provides for filing of an application and acceptance of the same by the Officer by issuing notice in Form 22 in terms of rule 30 of the KGST Rules and so much so, the assessee cannot be held responsible for short payment of tax under compounding scheme. In order to consider this argument, we have to refer to the statutory provision under which interest is levied which is extracted hereunder:

“23(3A): Where any dealer has failed to include any turnover of his business in any return

filed or where any turnover has escaped assessment, interest under sub-section (3) shall accrue on the tax due on such turnover with effect from such date on which the tax would have fallen due for payment had the dealer included the same in the return relating to the period to which such turnover relates.”

3. It is clear from the above provision that interest follows if there is a short levy either on account of the dealer not including any turnover of his business in the return filed or where turnover has escaped assessment. The test to be applied as is clear from the Section is that had the turnover been fully included in the return, would there have been short payment of tax on which interest is demanded. In other words, if the payment of tax fell short on account of non-filing of return or filing of return without including full turnover, interest is attracted. Since assessment is made with reference to return, escapement of tax happens on account of non-inclusion of turnover in the return. We find in this case that the appellant has

not included the purchase turnover of old gold under Section 5A in the return for the year 2000 - 2001 based on which appellant's liability for tax at compounded rate for 2001 - 2002 was demanded by the Officer. In fact, it is seen recorded in the assessment order that even though turnover under Section 5A was not declared in the return, Accounts for 2000 - 2001 produced by the assessee disclosed the purchase turnover of old gold ornaments which was includable in the return filed by appellant. Therefore, this is a case of omission to include taxable turnover under Section 5A in the return for the year 2000 - 2001 based on which the original demand of tax was made by the Assessing Officer under Section 7(1)(a) by issuing Form 22. In these circumstances, we are unable to accept the contention of appellant that the short payment of tax at compounded rate is not on account of non-inclusion of turnover in the return, but on account of mistake committed by the Assessing Officer. The assessment for 2000 - 2001 was not completed when compounding application was filed for 2001 -

2002. Therefore, the Assessing Officer had no opportunity to verify the Accounts to find out the tax payable based on the same and he has only considered appellant's liability with reference to return filed which did not cover purchase turnover of old gold under Section 5A. Therefore, the short levy and payment of tax is only on account of non-payment of tax in terms of Section 7(1)(a) which again was determined based on return filed in the preceding year. In the circumstances, we uphold the impugned order of the Commissioner of Commercial Taxes and dismiss the Appeal filed by appellant.

C. N. RAMACHANDRAN NAIR, JUDGE

K. M. JOSEPH, JUDGE

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